Supreme Court, U.S.
FILED
MAY 3 2002
OFFICE OF THE CLERK

No. 01-1129

In the

Supreme Court of the United States

MICHAEL PITTS and CHARLES LAWSON,

Petitioners,

v.

CITY OF KANKAKEE, an Illinois Municipal Corporation, DONALD GREEN, individually and as agent of the City of Kankakee, and CHRISTOPHER BOHLEN, individually and as agent of the City of Kankakee,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) May a property owner recover damages which result from the discrete act of placing a "slum property" sign upon the property in retaliation for the exercise of rights protected by the First Amendment, conduct which the owner believes to be actionable, and recovery for which would otherwise be time-barred by the statute of limitations, by relying upon a continuing violation concept?

2) Is the refusal of city officials to undo their prior illegal act, specifically, to remove the slum property sign which they had previously posted on the property, after being ordered to do so by the city council, a "fresh act" which will permit the property owner to obtain relief for the original posting of the slum sign which occurred outside the statute of limitations?

3) Is the failure of city officials to remove the slum property sign after the property was sold, coupled with the failure to place a slum property sign on that property identifying the new owner, a "fresh act" which permits the property owner to obtain damages for the original illegal act of posting the "slum sign"?

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STATEMENT OF THE CASE

In its opinion below, the Court of Appeals for the Seventh Circuit accurately and succinctly set forth the facts necessary for the determination of the issues in this case. For the sake of brevity, the respondents incorporate, by reference, that recitation of the facts. (Appendix to Petition, pp. 2a-3a.)

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE COURT OF APPEALS CORRECTLY APPLIED CONTROLLING PRECEDENT.

For claims seeking recovery of damages under 42 U.S.C. §1983, the courts are to apply the same statute of limitations that would be applied to state actions for personal injuries. *Wilson v. Garcia*, 471 U.S. 261 (1985). In Illinois, this is a two-year statute of limitations. *Johnson v. Supreme Court of Illinois*, 165 F.3d 1140, 1141 (7th Cir. 1999).

The two petitioners claim that in retaliation for exercising their free speech rights, signs were placed upon their property in June, 1997, at the direction of the mayor and city attorney, labeling their buildings as "SLUM PROPERTY". The petitioners believed, at the time, that the acts were retaliatory, yet did not pursue a claim until they filed this action more than two years later, on November 18, 1999.

As is apparent from the first question presented for review identified by the petitioners and the arguments set forth in Part IA of their petition, it is the position of the petitioners that their claims for damages arising out

of the acts of posting the signs are not subject to a period of limitations because, they argue, the injury is continuing. This view is inconsistent with the principle of repose which underlies statutes of limitations. The city officials took discrete action and the petitioners believed, at that time, that they were the victims of retaliation. Their claims for injury flowing from that act accrued at that time. The Court of Appeals for the Seventh Circuit, applying controlling precedent, correctly concluded that these claims are time-barred.

As observed by the court below, normally the statute commences to run at the time of injury, but the claim may accrue at a later date, for example, "when it 'would be unreasonable to expect the plaintiff to perceive offensive conduct' or when the earlier violation may be recognizable as actionable only in light of later events." *Pitts v. City of Kankakee*, 267 F.3d 592, 595 (7th Cir. 2001). The petitioners do not challenge the uniformity with which this principle has been applied by the courts nor do they claim to fall within one of the referred to exceptions. That the injury continues to flow from the prior act cannot carry the day for the petitioners for that is not the proper focus. "The emphasis is not upon the effects of earlier . . . decisions; rather, it 'is [upon] whether any present *violation* exists.'" *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). That there may be present or lingering effects of prior illegal acts that "'perpetuates the consequences of forbidden discrimination . . .'" is insufficient to avoid the time bar. (*Id.*). "[T]he emphasis should not be placed on mere continuity; the critical question is whether any present violation exists." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1997).

While the Court of Appeals recognized that drawing a line between what amounts to a "fresh act" of illegality

and the lingering effects of prior injury may not always be easy (267 F.3d at 596), the court found that the claim of the petitioners, for purposes of determining the time of accrual, was most analogous to a defamation claim. (267 F.3d at 596). When so viewed, under the "single publication rule," which has been promulgated by the Commissioners on Uniform State Laws, and which is contained in the Restatement, statutes and common law, the claim of the petitioners accrued when the signs were posted, and "[o]nly their effects lingered on until the signs were removed." (267 F.3d at 597).

Although the issue of when the claim accrued may be a question of federal law, it was appropriate for the Court of Appeals to refer to policy determinations made by state legislatures as "reflecting both 'reason' and 'experience.'" *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996); *accord Moragne v. State's Marine Lines, Inc.*, 398 U.S. 375, 390 (1990).

The petition makes no reference to the defamation analogy drawn by the court below. Rather, the petitioners criticize the court for creating "unpled" facts of defamation injury. (Petition at p. 16). This demonstrates a basic misunderstanding of the reasoning of the court of appeals.

The court did not create some injury for purposes of reaching its conclusion, but rather drew an analogy between the *publication* of a defamatory statement and the *posting* of the sign for purposes of determining when the petitioners' cause of action for retaliation would accrue. Under the single publication rule, which has been applied to claims for defamation, the court concluded that the petitioners' claims accrued with the posting of the signs. The petitioners' criticism of the court for creating a defamation injury is totally lacking of merit.

According to the view of the petitioners, without regard to whether an anchoring act or fresh act of retaliation occurred within two years of the filing of their complaint, their right to seek damages for the posting of the signs was not barred and could have even been maintained twenty-seven years later. Where it was apparent that they were the victims of retaliation, their claim for damages flowing from the act of posting the sign accrued at that time. The conclusion of the Court of Appeals that the mere presence of the signs did not amount to a fresh or illegal act was correct. As addressed more fully below, the Court of Appeals did not conclude that claims of retaliation based upon speech are to be treated any differently than claims of retaliation based upon religion.

II.

THE COURT OF APPEALS DID NOT CONCLUDE THAT PERSONS WHO ARE THE VICTIMS OF RETALIATION FOR ENGAGING IN PROTECTED SPEECH ARE ENTITLED TO LESS CONSTITUTIONAL PROTECTION THAN PERSONS WHO ARE THE VICTIMS OF RETALIATION BECAUSE OF THEIR RELIGIOUS PRACTICES.

The principle argument advanced by the petitioners that this action should be reviewed by this Court is their belief that this case should be controlled by a district court opinion in *Gonzales v. North Township of Lake County*, 800 F.Supp. 676 (N.D. Ind. 1992), and that in its effort to distinguish that opinion from the case before this Court, the Court of Appeals concluded that the Free Speech Clause is less deserving of constitutional protection than the Establishment Clause. (Petition at p. 9). As relevant to the retaliation claims before this Court, the Court of Appeals did not reach that conclusion, nor does the opinion have that precedential effect.

Neither the district court opinion in *Gonzales* nor the reversal of that decision by the Court of Appeals for the Seventh Circuit in *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993) have any precedential value as it relates to the issues in this case. In *Gonzales*, a town had erected a religious display upon its property and had continued to maintain it for twenty-seven years prior to a citizen filing a complaint for damages and injunctive relief against the town. While the district court did address the continuous violation argument advanced by the plaintiff, its discussion was dicta since the case was decided on the basis that the First Amendment was not violated by the religious display. The Court of Appeals reversed concluding that a claim was stated under the establishment clause.

Rather than simply dismiss the opinion of the district court as not having any binding, precedential value, the Court of Appeals, in this case, concluded that the Establishment Clause claim in that case was different because the constitutional violation "may not be obvious." (267 F.3d at 596). The petitioners maintain that the only difference between *Gonzales* and the case at bar is that the "sign" in *Gonzales* "contained a religious message and the Petitioner's sign didn't." (Petition at p. 9). However, there is a significant difference, one that ties in to the observation of the Court of Appeals that the constitutional violation may not be "obvious."

The claim of the petitioners involves a claim of retaliation specifically directed at them. The claim was obvious to them and their claim accrued at that time. Since the religious display was not directed at any particular person, the claim was not, in the view of the Court of Appeals, obvious to the plaintiff. Not being an obvious violation of the Establishment Clause, it could not be deter-

mined when that claim accrued. By no stretch can the decision of the Court of Appeals be construed as concluding that a different result would have been reached if the petitioners were the victims of retaliation for their religious practices rather than for their speech activity.

Moreover, while the issue of whether the continued presence of a religious display may not only be the subject of injunctive relief, but may also, through a continuing violation theory, permit the maintenance of a damages claim by the citizen of a town or by all of the citizens of a town may be the subject of scholarly debate, that issue, without any factual detail, cannot be resolved in the case before this Court. This case is about one discrete act of retaliation which the petitioners believed was unconstitutional.

III.

WHETHER THERE IS ANY DIFFERENCE IN THE APPLICATION OF THE CONTINUING VIOLATION THEORY IN THE FIRST AMENDMENT CONTEXT RATHER THAN IN AN EMPLOYMENT DISCRIMINATION CLAIM IS NOT AN ISSUE BEFORE THIS COURT NOR IS THE LAW ON THAT ISSUE UNCLEAR OR CONFUSING.

The petitioners observe that this Court has granted a writ of certiorari in *Morgan v. National Rd. Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000), *cert. granted* 523 U.S. 927 (2001). (Petition at pp. 9-10). The petitioners apparently suggest that this should be a companion case, but the issues involved are substantially different. *Morgan* involves a lengthy pattern and practice of racially motivated discipline and counseling, as well as a racially hostile environment claim arising out of a pattern and practice of ongoing and persistent harassment.

The question identified in that petition is whether employees may sue on "time-barred claims whenever incidents within the limitations period are 'sufficiently related' to the otherwise time-barred claims." (*Id.*). No similar issue has been identified by the petitioners. The Seventh Circuit has expressly refused to adopt the view of the Ninth Circuit in *Morgan* and continues to adhere to its prior precedent as well as the majority view. *Paul v. Bodine Elec. Co.*, 276 F.3d 345, 354 (7th Cir. 2002). The fact that certiorari has been granted in *Morgan*, an unrelated case dealing with a different issue, cannot be advanced as a basis for review by this Court.

As a basis for asserting that the case law is unclear and confusing, the petitioners refer to the same case law which was cited to the courts below in support of their position that the claim was not time barred. All of the authorities are distinguishable on their face and, in fact, other than *Gonzales,* none were deemed by the Court of Appeals to be worthy of discussion.

For example, *Williams v. Owens-Illinois, Inc.*, 765 F.2d 918, 924-25 (9th Cir. 1980), involved a nonpromotion claim. In *Kelly v. Metropolitan County Board of Education of Nashville*, 836 F.2d 986 (6th Cir. 1987), a county sought to enjoin the state from refusing to participate in desegregation, a dispute between a local public entity and a state, which was resolved on Eleventh Amendment immunity. *LRL Prop v. Portage Metro Housing Authority*, 55 F.3d 1097 (6th Cir. 1995), involved a property owner's claim of discrimination in enforcing building standards, and the court held that those claims were not time barred because the land owners had actual knowledge of the illegal acts. "Systematic violations" (Petition at p. 11) are not involved in this case, so whatever confusion may exist in that area, if at all, is of no import.

The Court of Appeals did not conclude that the law was confusing or unclear, but simply opined that drawing the line may not be easy. The decision was rendered without dissent, and no judge of the Seventh Circuit felt the issue to be worthy of rehearing.

Petitioner's rhetoric that that the law is unclear and confusing and citation to inapplicable and unrelated case law does not demonstrate any confusion on the precise issue before this court.

IV.

THE ACCRUAL OF A CAUSE OF ACTION AND THE BASIS FOR STATING A CLAIM AGAINST A PUBLIC ENTITY ARE UNRELATED CONCEPTS THAT HAVE NO BEARING ON THE ISSUES.

In Part IC, the petitioners confuse the concept of municipal liability under 42 U.S.C. §1983 with the issue of when a claim accrues. A municipality may be subject to liability under 42 U.S.C. §1983 only when some official custom, policy or practice is the moving force behind a constitutional violation. *See e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). The discussion of the Court of Appeals for the Seventh Circuit contains no mention of the issue of public entity liability. There cannot be any confusion or inconsistency between two wholly unrelated concepts.

V.

THE COURT OF APPEALS PROPERLY DETERMINED THAT THE CONTINUED PRESENCE OF THE SLUM PROPERTY SIGNS DID NOT CONSTITUTE A CONTINUING VIOLATION AND PROPERLY DETERMINED THAT THE FAILURE TO REMOVE THE SIGNS WAS NOT A FRESH ACT OF DISCRIMINATION.

In Part II, the petitioners essentially rehash their prior arguments, most of which have been addressed above.

Relying upon its prior precedent, the court held that the failure of the individual defendants to obey the command of the city council to remove the signs "is not a 'fresh act' of discrimination (or here, retaliation), but instead is a persisting effect of past discrimination that does not effect the running of the statute of limitations." (267 F.3d at 596). It is submitted that the decision of the Court of Appeals for the Seventh Circuit is a correct statement of the law, and not the decision of the district court in *Ferner v. Village of Sheffield*, 656 F.Supp. 1017, (N.D. Ohio 1987), relied upon by the petitioners. There is no support for the position of the petitioners that the failure to act, albeit in response to the command of the city council, is a fresh act. A "failure" to act cannot be "an act."

CONCLUSION

For the reasons set forth above, the respondents request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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